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October 24, 1996

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Rainbow Broadcasting Company
GC Docket No. 95-172

Dear Mr. Caton:

On behalf of Rainbow Broadcasting Company and Rainbow Broadcasting, Ltd, there is transmitted herewith and filed an original and six (6) copies of its "Joint Reply Findings of Fact and Conclusions of Law".

Should any questions arise with respect to this matter, please contact the undersigned counsel.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER, LLP

By: Bruce A. Eisen
Bruce A. Eisen

Enclosure

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of	)	
	)	
RAINBOW BROADCASTING COMPANY	)	GC Docket No. 95-172
	)	File No. BMPCT-910625KP
For an Extension of Time	)	File No. BMPCT-910125KE
to Construct	)	File No. BTCCT-911129KT
	)	
and	)	
	)	
For an Assignment of its	)	
Construction Permit for	)	
Station WRBW(TV), Orlando, Florida	)	

TO: The Honorable Joseph Chachkin
Administrative Law Judge

JOINT REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

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October 24, 1996

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SUMMARY

Three basic qualifications issues, an ex parte issue and two misrepresentation issues, were specified against Rainbow Broadcasting Company ("Rainbow"), permittee of Television Station WRBW(TV) at Orlando, Florida. A fourth issue was been designated to inquire into whether or not a waiver of Section 73.3598(a) of the rules was justified, or whether Rainbow was entitled to a grant of an extension of its construction permit pursuant to Section 73.3534(b) of the rules.

The record evidence in this proceeding shows that the ex parte issue should be resolved in Rainbow's favor. Rainbow's principals had no substantive involvement in the alleged violation, and Margot Polivy, Rainbow's counsel, had an honest belief that the proceeding was not restricted and that her contacts with the Commission's staff were permissible. The record also showed that she did not solicit any person's intervention with an intent to violate the rules, and that a merits discussion with the staff, which arguably violated the ex parte rules, was not accomplished surreptitiously or with a wrongful intent, but rather was the product of general confusion over the applicability of the ex parte rules.

The record evidence shows that Rainbow was financially qualified throughout the period of time covered by a financial misrepresentation issue, and that nothing had occurred during that period which would have required Rainbow to report to the Commission that it no longer could rely upon its lender.

An issue specified to determine whether or not Rainbow had misrepresented the nature of tower litigation in a Florida district court proceeding must also be resolved in Rainbow's favor

because Rainbow's representations regarding the litigation were accurate and, in any event, its controlling partner believed that Rainbow was prevented from construction by the court's status quo order.

Finally, since Rainbow never received a full 24-months after judicial review and before the lapse of its construction prmit in which to construct its facility, it was entitled to a waiver of Section 73.3598 or an extension under the hardship provisions of Section 73.3534(b). In addition, Rainbow's actual construction efforts and the expenditure of substantial funds provide independent support for an extension under the "substantial progress" provision of Section 73.3534(b).

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JOINT REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

Rainbow Broadcasting Company ("RBC") and Rainbow Broadcasting, Ltd. ("RBL") (collectively, "Rainbow"), by their attorneys, hereby submit their Joint Reply to the Proposed Findings of Fact and Conclusions of Law filed on behalf of Press Broadcasting Company, Inc. ("Press") and the Separate Trial Staff ("Staff")[1]. In support thereof, the following is shown:

I. PRELIMINARY STATEMENT

1. Three basic qualifying issues were specified against Rainbow, and a fourth issue inquired into whether or not Rainbow was entitled to a waiver of Section 73.3598(a) of the Commission's rules or an extension of its construction permit pursuant to Section 73.3534(b) of

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[1] Only RBC is herein replying to the Proposed Findings of Fact and Conclusions of Law relative to Issue Number 1.

the rules. In its Proposed Findings of Fact and Conclusions of Law, RBC demonstrated that Rainbow counsel, Margot Polivy, had an honest belief that her contacts with Commission staff were permissible and that she solicited no person's intervention with an intent to violate the Commission's ex parte rules. RBC and RBL further showed that Rainbow was financially qualified to construct and operate its television station as proposed throughout the period of time covered by a financial misrepresentation issue. They also demonstrated that a third issue, specified to determine whether or not Rainbow had misrepresented the nature of tower litigation in a Florida district court, must be resolved in Rainbow's favor. Joseph Rey, Rainbow's controlling partner, believed that Rainbow had been subject to a judicially ordered status quo which precluded further construction while its request for a preliminary injunction remained pending. Finally, RBC and RBL showed that since Rainbow had never received a full 24-months in which to construct its facility, and because it had made substantial progress in construction, although impeded by reasons beyond its control, Rainbow should receive an equitable waiver of the Commission's rules or should have its extension application granted for meeting the requirements of the rules.

II. EX PARTE ISSUE

2. Press and the Staff have split on the question of Rainbow's disqualification under the ex parte issue. Press' position is wholly unsupportable, and the Staff's conclusion -- while ultimately correct -- is premised upon findings that are imprecise and without record support. It would be error for the Presiding Judge to disqualify Rainbow pursuant to Issue Number 1, especially since all parties agree that the Rainbow principals had no involvement, other than passively attending a meeting at the instruction of their attorney, in the alleged ex parte violation.

The only question for consideration is whether or not Rainbow's attorney, Margot Polivy, harbored such an intention, and the resolution of that question should not affect the outcome of this case. In any event, Rainbow has met its burden of proof that Margot Polivy did not intend to violate the ex parte rules in order to garner some advantage over Press.

3. Press' Findings of Fact are markedly free of "findings" and are, instead, an amalgam of conclusions and conjectural meanderings which, on occasion, utilize transcript citations out of context in order to emphasize some self-serving point. There is also an air of vindictiveness in Press' filing that serves to emphasize the skewed nature of its arguments. Only a party which recognized its shortcomings would approach an issue in such a manner.

4. Press contends that the October, 1991 letter from Douglas A. Sandifer [2], a copy of which was sent to Polivy, specifically recited that Press' prior-filed pleadings rendered Rainbow's construction permit proceeding "restricted" pursuant to Section 1.1208 of the Commission's rules. At hearing, Polivy testified to her belief that Section 1.1204(a) had controlled the proceeding, but Press asserts that Sandifer's letter implicitly states that its pleadings were deemed "formal petitions" since they had been the only oppositions which had been filed and because Section 1.1208 relates to "formal pleadings".

5. That is nonsense! Even assuming that the rule of the case established an ex parte rule violation, neither the court nor the Commission ever analyzed the footnote to Section 1.1204(a) which permits oral ex parte communications between the Commission and the formal party involved or its representative, but not between the Commission and an informal third party. Press predictably avoids any meaningful discussion of the footnote, and its quantum leap that the

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[2] Joint Hearing Exhibit No. 4.

Sandifer letter elevated its prior filings to formal status is unconvincing. The most cursory review of the note to Section 1.1204(a) together with the rule, itself, shows that there are no ex parte restraints on "the formal party involved" in a case, but that such restraints do exist with regard to informal objectors. Polivy's understanding of the rule was wholly in accordance with the note and with past Commission precedent. See, Redwood Microwave Association, Inc., 61 FCC 2d 442 (1976) (no standing conferred on petitioner for reconsideration following petitioner's earlier participation as informal objector). Moreover, all participants in the matter, including Gordon, agreed that Polivy believed that the ex parte rules did not apply to the contacts (Tr. 1032, 1039). Hence, Polivy's testimony regarding her construction of the Sandifer letter should be credited, and Press' contention should be rejected.

6. Press attempts to make much of the conversations between Polivy and Paul Gordon, the staff person assigned to process the RBC applications and who, according to Press, is virtually incontestable. Nowhere does Press demonstrate why Gordon's testimony should be credited over Polivy's. It simply contends that Polivy's admitted "aggressive status calls" must have crossed over into arguments on the merits since Polivy had testified that she was not bound by the ex parte rules in her contacts with Gordon. That speculation not only transcends reason, it runs counter to the record evidence.

7. Gordon never testified that Polivy actually discussed the merits of the case, and he was at a loss to describe what Polivy's "attempt" to discuss the merits consisted of. His testimony creates nothing more than a vacuum of record evidence which could only be filled with conjecture. Press rambles on and speculates to dizzying heights about Polivy's motives and actions, but it chooses not at all to address the facts that Gordon completely failed to comply

with established Commission rules by not reporting the alleged ex parte contacts. Similarly, Press cannot neutralize Gordon's shocking lack of knowledge as to the nature of an ex parte contact. The resolution of an important, potentially disqualifying issue should not turn on Gordon's inexact testimony which revealed a profound failure to understand the way in which the rules were applied and which was unsupported by the required ministerial, record keeping action which would have at least indicated his belief that there had been an ex parte contact at the time. Gordon's inability to recall the nature of the Polivy contacts and his failure to properly document the conversations reduces his credibility. Any claim that Gordon's version of the facts is to be preferred over Polivy's does not withstand scrutiny.

8. Polivy's testimony that there was no reason to speak to the merits is entirely plausible. She testified several times to her understanding that the cycle of pleadings had long ago ended, that everything that could have been argued had already been submitted, and that all Gordon and the Video Services Division had to do was to reach a decision! There was no need for Polivy to have initiated a merits discussion with Gordon. Gordon's own testimony was unspecific and far too vague to have placed Polivy's contacts in an unfavorable light. Press urges the Presiding Judge to consider Gordon's testimony as untarnished and helpful, but it fails to grapple with several pieces of the puzzle which are unexplained and ultimately decisional.

9. Press argues that Antoinette Cook Bush's contacts with the Commission's staff exceeded a mere status inquiry and resulted in prohibited ex parte contacts. To support that faulty conclusion, Press points to record evidence showing a number of telephone calls between Bush and Polivy shortly after the Video Services Division had denied Rainbow's applications, and directly before the July 1, 1993 meeting in the Bureau Chief's office. Central to Press'

attack is the purpose for which Polivy solicited Bush's help on the matter. Why, urges Press, was there a need for a status inquiry when there was no longer pending any matter for consideration in light of the June 18, 1993 letter which purported to resolve the proceeding? In the absence of a legitimate answer, Press concludes that Polivy intended that Bush argue the merits to staff personnel so that the decision would somehow be reversed. That reasoning discounts testimony which more than adequately responded to the question.

10. Polivy and Bush provided reasonable explanations for seeking the latter's involvement. A key factor was Polivy's concern that the Rainbow application proceeding had taken an unconscionable amount of time to work its way through the Video Services Division. Her testimony regarding her contacts with Gordon shows a perturbation with the Video Services Division's failure to act on the applications. It also reflects a disbelief that the Division could have taken such a position on the merits. Under the circumstances, enlisting Bush to contact Roy Stewart, the Bureau Chief, could have benefited Rainbow without in any way violating the ex parte rules. Polivy believed that a primary reason for the erroneous decision was the "senior staff's" failure to review the facts surrounding the applications; that Bush's telephone call would have prompted higher level staff persons to address the questions raised upon appeal; and that such treatment would greatly abridge the time needed to reach a decision (Tr. 520). These were justifiable reasons to request Bush to bring the matter to Stewart's attention. Moreover, as Bush testified, there was nothing unusual about Polivy's request or about Bush's contact as counsel to the United States Senate Commerce Committee (Tr. 558-559).

11. Press is plainly wrong when it argues that there is no record evidence to explain why a "status inquiry" was necessary. Anyone who practices before the Commission, advocates

the grant of a given application, and observes a failure to process the application for what amounts to a prodigious amount of time could have reasonably employed strategy similar to Polivy's. Her intention was not to "back door" the rules in order to gain an advantage over another party; it was to present the problem to the few Commission staff persons who might be expected to act with some sense of promptness and in accordance with past policy. Bush's telephone contact helped accomplish just that. Her involvement was merely a prelude to the July 1, 1993 meeting in Stewart's office at which, of course, the merits of the proceeding were addressed.

12. Press claims that Polivy never meaningfully informed the staff that possible ex parte restrictions might have arisen from Press' pleadings. That is untrue, and in any event, Gordon himself appears to have alerted Commission staff persons to these matters. There is no doubt but that the participants at the July 1, 1993 meeting were reasonably apprised of the pleadings. Predictably, Press omits reference to the fact that Polivy distributed a memorandum to those in attendance which cited both Press' informal objections and its request for reconsideration (Rainbow Exhibit No. 8, Appendix A). Hence, the nature of Press' involvement was identified and set forth at the July 1, 1993 meeting, and still there was a discussion of the merits! It is not difficult to explain why: No one -- not Polivy, not Stewart, not any member of the staff -- fully understood the ex parte rules as they were later explicated by the Commission. And when the Commission ultimately found a violation, it noted both that this was a case of first impression and that Polivy's interpretation of the ex parte rules had been plausible. See, Rainbow Broadcasting Company, 9 FCC Rcd 2839, 2844-2845 (1994). In light of these facts, it is virtually impossible to impute to Polivy an intention to violate the rules.

13. The Staff concludes that Rainbow should not be disqualified under the ex parte issue and that, indeed, as the Commission had earlier found, Rainbow had a sincere and reasonable belief that the proceeding was not restricted. Nevertheless, the Staff offers several conclusions of law which cannot go unaddressed and which show a lack of balance in the manner in which it has measured the evidence.

14. First, the Staff recites that Gordon's testimony is "clearly more credible than Ms. Polivy's and should be accepted as an accurate statement of the facts." The matter of Gordon's poor credibility has already been dealt with.[3] The Staff next observes that Polivy's "claim that she believed the proceeding was not restricted as to Rainbow," makes it more likely that she would seek to press her views on the merits in her "aggressive" status calls to Gordon. That cannot rise to the level of evidence that she did so; it is manifestly no basis for the further conclusion that she both did so and then lied about it. The Staff also notes that Polivy was "upset" and "irate" at the Video Services Division June, 1993 decision, an observation that may have been true, but provided reason for Polivy to have discussed the merits with Gordon. The merits had been adequately set forth, and all she requested was some action by the Staff, a reasonable request which went unmet for a very substantial period of time. The Staff chooses to avoid discussion of Gordon's elliptical responses and vague cross-examination testimony

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[3] In support of its conclusion that Polivy's testimony is not believable, the Staff assumes that Polivy had a reason, after receiving the Video Service Division's March 22, 1993 letter, to raise the merits with Gordon so that she might convince him that Rainbow's applications should be granted. This contention is untenable. That letter (Joint Hearing Exhibit No. 6) merged into the pleadings that had been filed on behalf of both Press and Rainbow. Rather than serving as an independent basis for Polivy to raise the merits, it was simply another landmark in the proceeding which caused a delay in the resolution of the case. Nothing that Polivy could have said in response to the March 22, 1993 letter would have gone beyond what had already been expounded upon in Rainbow's pleadings.

regarding what Polivy did or did not state during their telephone conversations. Accordingly, there is no sound basis for the Staff to have concluded that Gordon's testimony is of greater weight than Polivy's.

15. It is particularly troubling that the Staff places wholesale reliance upon the alleged thought processes of individuals who were never subject to cross-examination, claiming that "the testimony of the FCC's staff should be credited over that of Ms. Polivy". Such an assertion makes virtually no sense. It is improper to conclude that Pendarvis and/or Stewart denied discussing with Polivy whether any formal objections had been filed in the proceeding. They were not tested at hearing, and the asserted denial of Pendarvis is contrary to the testimony of both Gordon and Polivy. Moreover, there is no good reason to accept the Staff's prejudicial contention in light of the fact that Rainbow Exhibit No. 8, Appendix A, was distributed to all those in attendance at the July 1, 1993 meeting in Stewart's office. That document made particular reference to the Press objections, including its request for reconsideration. Thus, the idea that Polivy never disclosed the nature of the pleadings is at odds with the record evidence. It is Polivy's testimony which appears the more credible.

16. In its conclusions of law, Press states that a failure to condemn ex parte violations would make a mockery of justice. Needless to say, no party to this proceeding would urge the Presiding Judge to condone an ex parte violation. However, neither Polivy nor any Rainbow principal intended to violate the rules. Certainly, there is no support for Press' argument that there was some "surreptitious ex parte attempt" to influence the Commission. If nothing else, the document that Polivy circulated at the July 1, 1993 meeting is convincing proof that she had no design to circumvent the rules in some nefarious way.

17. Press claims that the record reveals no confusion regarding the meaning of the ex parte rules. That, too, is untrue, for the Commission, itself, pointed out that the rules were uncertain. Everyone was confused by the ex parte rules, at least under the circumstances presented by this case of first impression, and even Press concedes that the Commission has never disqualified an applicant for violating the ex parte rules. See, Centel Corp., 8 FCC Rcd 6162 (1993); Pepper Schultz, 4 FCC Rcd 6393 (Rev. Bd. 1989).[4] If there was an ex parte violation resulting from Bush's intervention or the meeting in Stewart's office, the general misunderstanding of the applicability of the rules alone suffices to establish that the violation was not deliberate.

III. FINANCIAL MISREPRESENTATION ISSUE

18. The gravamen of the financial misrepresentation issue is whether or not Rainbow sought to deceive the Commission with respect to the availability of financing to construct and operate its proposed television station. Specifically, Issue No. 2 inquires into whether Rainbow was truthful when it represented to the Commission in its fifth and sixth extension applications that it was ready, willing and able to construct the facility if the applications were granted.

19. The uncontroverted and unequivocal testimony of Joseph Rey and Howard Conant demonstrates that at all times during the relevant post-judicial review period (August, 1990-July, 1993), Rainbow had a bona fide commitment from Conant that was never withdrawn. However, because for a period of time during the tower litigation in Florida, Rey believed that an adverse outcome might doom the project, the Staff concludes that Rainbow lied

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[4] Finally, Press contends that WKAT, Inc. v. FCC, 296 F.2d 375 (D.C. Cir. 1961), cert. denied, 368 U.S. 841, justifies an alternative sanction if disqualification were deemed too harsh. This argument is specious on its face since the suggested "alternative" is co-extensive with disqualification of Rainbow.

to the Commission in the extension requests. The Staff's theory ignores the fact that Rey's fear never materialized, and that by the time Rainbow was able to proceed with construction, Rey had changed his mind about the station's prospects. There was no obligation to report the possibility of failure before it actually occurred; Section 1.65 of the Rules requires applicants or permittees to report changes, not possible or potential changes.

20. However, the Staff concludes that Rainbow intentionally misrepresented facts with regard to its financial qualifications "or at a minimum was lacking in candor" when it filed its fifth extension application on January 25, 1991 (Joint Hearing Exhibit No. 3). This conclusion is premised upon its belief that Rey knew that there had been a "substantial condition" placed upon Rainbow's ability to obtain financing because Conant, Rainbow's lender, did not have a present, firm intention to make the requisite loan. Rainbow's non-disclosure, argues the Staff, was revealed during Rey's testimony in the Florida tower litigation when he cited Conant's feeling that if Press entered the market as the fifth operating station, he would probably not provide funds to Rainbow. Since Rey's testimony occurred approximately two weeks before Rainbow filed its fifth extension application, the Staff asserts that Rey concealed the truth by failing to disclose that the construction permit had no value unless Press were kept off the Bithlo tower, a substantial contingency, the withholding of which was exacerbated by Rainbow's extension statement that it was "ready and willing" to proceed with construction upon a ruling from the district court.

21. Press concludes that Rey was untruthful regarding Rainbow's financial qualifications because he never mentioned in the district court proceeding that he had provided Conant with a personal guarantee in return for the latter's $4 million commitment. This, Press

maintains, indicates that no such guarantee requirement was in place at that time. In any event, Press states that the district court Judge found, as a factual matter, that Rainbow had not obtained financing, and that Rey's own district court testimony showed that Rainbow was without financing during the period that Rainbow had sought injunctive relief. Press concludes that any agreement between Rainbow and Conant was placed "on hold" until it could be ascertained who would enter the market as the fifth station since Rey had previously testified that there was a "likelihood" that Conant would not finance the station if Press were able to operate from the tower.

22. It is well established that an applicant's financial qualifications do not have to be supported by a written document, and that if an oral understanding includes all the requisite terms it may be sufficient for Commission purposes. See, Emision de Radio Balmaseda, Inc., 8 FCC Rcd 4335 (1993). Rainbow was financially qualified to construct and operate its proposed facility since the filing of its original application and through the relevant time period subsumed under Issue No. 2.

23. The attack on Rainbow's financial qualifications focuses on a narrow period of time in relation to the number of years that transpired since its initial filing. Press and the Staff contend that whatever reasonable availability of funds had previously existed was lost between November, 1990 and the summer of 1991.[5] That chronology represents the period of time between the signing of the complaint in the tower litigation and Rey's renewed belief in the viability of the television station.

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[5] The Staff does not question Rainbow's financial qualifications outside this span.

24. There is a critical difference between intellectual pessimism and the kind of overt act which directly impacts upon the financial qualifications of a broadcast applicant. Hence, in Reporting of Changed Circumstances, 3 RR2d 1622, 1625 (1964), the Commission rightly observed that some material matters may normally fluctuate, and that the kind of financial changes which must be reported are those which are major or out of the ordinary and which will make a difference from the standpoint of the public interest. Why should an applicant's thoughts on his proposal's viability not fluctuate over the enormous amount of time spent in the application process?

25. When, in the district court proceeding, Rey testified with regard to the prospect of competition in the Orlando television marketplace, he referred to a "possibility" that might diminish the viability of Rainbow's station. That does not translate into the kind of event which would have triggered the need to report a loss of financial qualifications to the Commission. Cf., Edwin A. Bernstein, 6 FCC Rcd 6841 (Rev. Bd. 1991) (bank letter commitment rescinded); Paradise Broadcasting Communications Systems, Inc., 100 FCC 2d 387 (Rev. Bd. 1985) (applicant disqualified for basing financial showing on ownership of allegedly unencumbered parcels of land which became encumbered after application had been filed); Belo Broadcasting Corp., 68 FCC 2d 1479 (1978) (applicant disqualified for, inter alia, failing to inform the Commission that withdrawing stockholders were no longer endorsing loan, and that without said endorsements, applicant had no chance of obtaining loan). The aforementioned cases, and others like them, concerned specific occurrences that nullified the reasonable availability of financing and required the applicant to report facts. These occurrences were all time specific, which is to say that an event transpired which obliged the applicant to disclose it. In this case, however,

nothing happened. There was simply a possibility that the project might sour in the future. There was also a possibility that it would not. Section 1.65 of the rules addresses more than a mere possibility; it contemplates an actual, substantial change, and there was no actual change between November, 1990 and June, 1991.

26. The record shows that Rey had come to believe that the Rainbow project might be economically meaningless if its station became the sixth, rather than the fifth station in the Orlando market. It appears that both Rey and Conant had some uncertainty about moving forward, but the very fact Rainbow continued to prosecute its Florida lawsuit demonstrates that no actual change occurred which would have triggered a need to report a loss of financing. To conclude otherwise, completely discounts Rainbow's willingness to reach for the light at the end of the tunnel. This was not a case of a loan expiring, a cataclysmic financial set-back or a private lender pulling the plug. The pessimism that existed in Rey's mind lasted approximately six months, and the only act which would have required disclosure to the Commission would have been Rey's decision upon a loss of the preliminary injunction that the station would no longer be viable. As the record amply reflects, that never happened, because fresh information came to light which significantly brightened Rey's outlook.

27. It is hornbook law that a "condition subsequent" refers to a future event, the occurrence of which will affect a prior right. This case presents something analogous to a condition subsequent, because Rainbow's continued financial qualifications and the long term health of its project depended upon a factor which had to occur at some point in time when the tower litigation ended. Thus, the fact that Rey may have envisioned Rainbow's "worthlessness" as the sixth market station, did not affect the Conant financial commitment on the day that the

lawsuit was filed in November, 1991, nor on the dates that Rainbow tendered its fifth and sixth extension applications to the Commission, nor on any other date. The only time at which Rainbow would have been compelled to report that it had lost its financing would have been when and if it truly lost its financing. In reality, however, by June 6, 1991, when the district court denied the motion for a preliminary injunction, market conditions had changed so that the project was viable. Rainbow's financial commitment remained intact.

28. The Staff concludes that the future possibility that the Conant loan might become unavailable if Rainbow were the sixth station, constituted a "substantial condition" upon Rainbow's ability to obtain financing. Such a possibility was not the kind of event that diluted Conant's present, firm intention to make the loan. However, the record shows that Conant and Rey communicated during the relevant period of time and neither ever expressed a desire to dissolve their agreement. Further, the "wait and see" attitude that Conant expressed did not neutralize the commitment. Plain and simply, what could have happened in the future is not a reason to disqualify Rainbow: The permittee continued throughout the relevant period to rightly rely upon Conant's financing commitment.

29. Press incredulously states that Rey never mentioned in the district court proceeding that he had provided Conant with a personal guarantee in return for the loan commitment, so that the specific terms of the agreement had not been agreed upon at the time of Rey's testimony. Rey's guarantee was of no relevance to the issue before the district court. Rainbow showed in its Proposed Findings of Fact and Conclusions of Law that the matters addressed by the district court and those which are now at issue were vastly different. Judge Marcus' conclusion that there was an absence of convincing proof that Rainbow had financial

backing was premised upon his finding that it had no written financial document upon which to rely. That is by no means the standard to be utilized by the Presiding Judge and the Commission in resolving the present financial misrepresentation issue. The district court had no occasion to evaluate the FCC's "reasonable assurance" standard, but rather addressed the "ongoing" nature of Rainbow's business. The sole question here for consideration is whether Rainbow misrepresented facts to the Commission, and Press tries mightily to confuse what is in issue by urging some perverse form of collateral estoppel.

30. The possibility of a future occurrence, in this case the prospect of Rainbow becoming the sixth station in the Orlando market, is not an event to trigger a Section 1.65 filing requirement. Contrary to the arguments of Press and the Staff, the record evidence demonstrates that at all times Conant was willing to live up to the negotiated terms of the financing agreement. Indeed, the record reveals more uncertainty on Rey's part than on the lender's. The financial misrepresentation issue should be resolved in RBC's favor.

IV. TOWER LITIGATION ISSUE

31. This issue seeks to determine whether Rainbow made misrepresentations of fact or lacked candor "regarding the nature of the tower litigation in terms of the failure to construct in connection with its fifth and sixth extension applications." There are two basic questions germane to this issue: (1) was Rainbow truthful and candid when it stated that "[a]ctual construction has been delayed by a dispute with the tower owner";[6] and (2) did Rainbow intend

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[6] Joint Exhibit No. 2, page 3. The relevant text reads in full as follows:

> Upon denial of rehearing by the Supreme Court, Rainbow engaged engineering services to undertake construction of the station. Actual construction has been delayed by a dispute with the

(continued...)

to deceive the Commission by making the statement. The Staff maintains (Findings, page 65) that the statement was misleading, inaccurate and, at a minimum, lacking in candor, because Rainbow voluntarily filed the suit and was equally free to dismiss it.[7] That crabbed view of the case, which revives and extends the Commission-rejected reasoning of the original Video Services Division opinion, is no more sensible than saying Rainbow could have avoided the extension of time problem by dismissing its application. The evidence clearly demonstrates both the truth of Rainbow's challenged statement and the absence of intent to deceive.

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[6] (...continued)

> tower owner which is the subject of legal action in the United States District Court for the Southern District of Florida (Case N. 90-2554 CIV MARCUS). A Motion for Preliminary Injunction was heard in January 11, 14 and 16, 1991 and is scheduled to conclude on January 23, 1991, with a decision anticipated shortly thereafter.
>
> Rainbow anticipates that its exclusive right to the use of the tower aperture will be recognized by the District Court. Rainbow is ready, willing and able to proceed with construction upon a ruling by the District Court and anticipates completion of construction within 24 months of a favorable court action.
>
> Pursuant to Rule 73.35 34, Rainbow seeks leave to file this request less than 30 days prior to expiration of its construction permit because the preliminary injunction hearing regarding its use of the antenna site was originally scheduled for December 22, 1990, but was postponed until January 11, 1991. Rainbow had expected to be able to report the result of that hearing to the Commission at the time it filed its request for extension, In view of the fact that it is now anticipated that the decision of the District Court will not be submitting this request less than 30 days prior to the expiration of its permit.

Ibid., at pages 3-4.

[7] See, also, Findings, page 32, where the Staff trumpets the news that Rey "finally admitted" that he could have avoided the court's status quo order by dismissing the case.

32. What Rainbow told the Commission "regarding the nature of the tower litigation" in its fifth extension application, filed five months after completion of judicial review, is uncontroverted. The only reference to the tower litigation was the above quoted portion of Exhibit A to that extension application. All parties stipulated (Tr. 830) that the "litigation" referred to in the fifth and sixth extension applications was the tower litigation in general, not the preliminary injunction, as the Staff now claims (Findings, page 26).

33. Nowhere did Rainbow claim that the Florida court had ordered Rainbow not to construct or tell the Commission that it required an extension because of the Florida proceeding. These claims were Press' assertions, assertions which the Commission expressly rejected in finding that "Rainbow did not . . . represent to the Commission that the tower litigation precluded it from construction." Joint Exhibit No. 10, paragraph 43. The Court of Appeals accepted the gloss Press put on Rainbow's statement for purposes of judicial review and consequently instructed the Commission to examine the matter further. However, in remanding the question, it did not preordain the outcome of that further inquiry as the Staff suggests in claiming that Rainbow must be held to have relied upon the tower litigation as the rationale for its fifth extension.[8]

A. Rainbow's Statement about the Tower Litigation was Truthful.

34. Rainbow's report of the tower litigation was accurate and straightforward. After expending hundreds of thousands of dollars in tower space rent to preserve a specific antenna slot and four years into a 15 year lease, Rainbow suddenly discovered in August 1990 that the tower

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[8] Nor could it have done so as a jurisdictional matter. Such a judicial predetermination would manifestly have exceeded the court's authority, since such judgments are always committed to the Commission's discretion in the first instance.

landlord intended to breach its agreement and permit Rainbow's competitor into its aperture.[9] Rainbow had every right and reason to undertake legal action to preserve its position and protect its investment.

35. Rainbow filed suit against the tower owner in late 1990. The case was removed to federal district court. In November 1990 and again in January 1991, the district court issued status quo orders directing the landlord to do nothing pending a decision on the plaintiff's preliminary injunction motion. Because Rainbow's lease required the landlord to undertake the construction (Rainbow Exhibit No. 6, pages 4, 6), the status quo order, as a practical matter, precluded Rainbow from going forward with construction. This is what Rainbow believed, this is what Rainbow told the Commission, and this is the truth. The Staff's effort to cast Rainbow's plain factual statement as somehow deceitful has no evidentiary support.

36. The sixth extension request was equally straightforward. As soon as the status quo order was vacated by the June 1991 denial of the preliminary injunction Rainbow had sought, Rainbow immediately commenced actual construction. The denial of the preliminary injunction was timely reported to the Commission in Rainbow's June 25, 1991 sixth extension request. This update to the January status report was wholly accurate and is not challenged.

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[9] The merit of Rainbow's belief that its lease was exclusive and that its space could not be invaded without consent is supported by the record evidence of its own conduct and that of the landlord as well. Rainbow committed half a million dollars to payments on the lease, which it signed in 1986 before it had a final grant; and as early as 1988 and again in 1989, the landlord asked for and was denied Rainbow's permission to rent space in its aperture to Press, ultimately settling the case by making a substantial cash payment to Rainbow in exchange for its agreement to share the space.

B. Rainbow had No Duty to Report Details of the Tower Litigation and Did Not Lack Candor.

37. The Staff's attribution of nefarious significance to the fact that Rainbow did not acquaint the Commission with all particulars of the ongoing tower litigation is unavailing. In the first place, as reflected in footnote 6, supra, Rainbow's exhibit made clear the central facts of the matter -- that there was a dispute between Rainbow and its landlord, the tower owner, about whether Rainbow had exclusive rights to its tower position; that suit had been filed and a preliminary injunction was being heard; and that Rainbow believed its exclusive right to its antenna aperture would be recognized by the court.[10]

38. Moreover, even if Rainbow's tower litigation statement were erroneous or incomplete, its failure to provide more accurate or complete information would not support the disqualification Press and the Staff seek. "To be disqualifying as a misrepresentation or lack of candor, an erroneous statement must be more than inaccurate or incomplete. The sine qua non of wilful misrepresentation or lack of candor is fraudulent or deceitful intent." Lompoc Minority Broadcasters Partnership, 10 FCC Rcd 9396 (Rev. Bd. 1995).

39. More to the point, however, unless the lawsuit somehow cost Rainbow its site, even that much explanation was not required. Indeed, there was no requirement that the lawsuit

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[10] Rainbow is wholly at a loss to understand the Staff's suggestion (Findings, page 29) that Rainbow somehow wrongfully failed to "alert" the Commission to the fact that Rainbow was the plaintiff in the suit. It is hard to imagine how anyone could have thought otherwise on the basis of the facts as recited to the Commission and in any case the Staff offers no theory on which Rainbow's entitlement to a 24 month construction period could be affected by whether it was the plaintiff or the defendant in the suit. While Rainbow, as the plaintiff, could have dismissed the case to avoid the effect of the status quo order, as the Staff irrationally contends it should have done, as defendant, its position would be no different: it could simply have given the plaintiff whatever it wanted so the plaintiff would dismiss the suit.